

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MADELINE SILCOX, as successor-
in-interest to the Estate of Philip
Silcox, individually and on behalf of
all others similarly situated,

Plaintiffs,

v.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY,

Defendant.

Case No. 14cv2345 AJB (MDD)

ORDER GRANTING IN PART AND
DENYING IN PART
DEFENDANT’S MOTION TO
DISMISS AND MOTION TO
STRIKE

(Doc. No. 4)

Presently before the Court is Defendant State Farm Mutual Automobile Insurance Company’s (hereinafter referred to as “State Farm”) motion to dismiss and/or strike portions of Plaintiff Madeline Silcox’s (“Plaintiff”) complaint. (Doc. No. 4.) For the reasons set forth below, State Farm’s motion to dismiss and/or strike is **GRANTED IN PART** and **DENIED IN PART**.

I. BACKGROUND

On or about August 25, 2000, Philip Silcox (“Philip”) purchased an insurance policy (policy number HLF271485553, and hereinafter referred to as the “Policy”) from State Farm to provide long-term care insurance with Philip Silcox as the insured. (Doc. 1-1, ¶ 17.) The Policy covers expenses incurred if the insured requires “Qualified Long-

1 Term Care” in a “Long-Term Care Facility.” (*Id.* ¶ 18.) “Qualified Long-Term Care” is
2 defined in the Policy as “necessary diagnostic, preventive, therapeutic, curing, treating,
3 mitigating, and rehabilitative services and Maintenance or Personal Services which are
4 required by a Chronically Ill individual, and are provided pursuant to a Plan of Care
5 prescribed by a Licensed Health Care Practitioner.” (*Id.*) The Policy defines “Long-
6 Term Care Facility” as a facility that is “engaged primarily in providing Long-Term Care
7 and related services to inpatients in one location and is licensed and accredited by the
8 appropriate agency to provide such care if required by the state where it is located.”
9 (Doc. No. 1-1, ¶ 18, Doc. No. 4-3, p. 8.)

10 Plaintiff alleges that Philip relied upon State Farm’s representations and sales
11 presentation in deciding to purchase long-term care insurance from State Farm. (Doc.
12 No. 1-1, ¶ 19.) Specifically, Plaintiff alleges that Philip purchased the Policy from State
13 Farm because of State Farm’s representations that the Policy was a “Qualified Long-
14 Term Insurance Contract” as defined by the Internal Revenue Code of 1986 and other-
15 wise complied with federal and state law. (*Id.* ¶ 20.) After purchasing the Policy, Philip
16 complied with and performed all obligations under the Policy, including the payment of
17 all required premiums. (*Id.* ¶ 21.)

18 On or around July 30, 2012, Philip was admitted to a licensed Residential Care
19 Facility, ActiveCare, which is located in San Diego County. (*Id.* ¶¶ 22,23.) Plaintiff
20 alleges that ActiveCare is a “Long-Term Care Facility” as defined by California law and
21 provides “Qualified Long-Term Care” as defined in the Policy. (*Id.* ¶¶ 24, 25.) After
22 being admitted to ActiveCare, Philip timely requested benefits under the terms of the
23 Policy. (*Id.* ¶ 26.) In response, State Farm sent Philip a written denial of the full benefits
24 under the Policy on September 4, 2012. (*Id.* ¶ 27.) Plaintiff alleges that the denial of full
25 policy benefits was due to State Farm’s false representation that the licensure of
26 ActiveCare fell within the Home and Community-Based Benefit under the terms of the
27 Policy. (*Id.*) Accordingly, State Farm paid eighty percent of Philip’s long-term care
28 charges at ActiveCare. (*Id.* ¶ 27.) Thereafter, State Farm continued to pay eighty

1 percent of the monthly long-term care charges incurred by Philip leaving Plaintiff and or
 2 Philip to pay the remaining twenty percent. (*Id.* ¶ 28.) The monthly charges for Philip’s
 3 long-term care was \$4,800 per month, of which State Farm paid \$3,839.92, leaving an
 4 unpaid monthly amount of \$960.08. (*Id.*) Philip remained at ActiveCare from July 2012
 5 until he passed away in August 2014. (*Id.* ¶ 5.) Plaintiff alleges approximately \$23,000
 6 in policy benefits as damages. (*Id.* ¶ 14.)

7 On August 29, 2014, Plaintiff filed a class action complaint in San Diego Superior
 8 Court alleging claims for violation of California’s Unfair Competition Law (Bus. & Prof.
 9 Code § 17200, et. seq.), False Advertising Law (Bus. & Prof. Code § 17500, et. seq.),
 10 breach of contract, breach of the implied covenant of good faith and fair dealing,
 11 intentional misrepresentation, and negligent misrepresentation. (*See* Doc. No. 1-1.)
 12 Plaintiff asserts the first and second causes of action for violation of the Unfair Competi-
 13 tion Law (“UCL”) and False Advertising Law (“FAL”) on behalf of class plaintiffs, and
 14 the remaining causes of action individually. On October 3, 2014,¹ State Farm removed
 15 the case to federal district court under the Class Action Fairness Act. (*See* Doc. No. 1.)
 16 On October 10, 2014, State Farm filed the instant motion to dismiss and/or strike
 17 portions of Plaintiff’s complaint. (Doc. No. 4.) State Farm moves to dismiss the unfair
 18 competition, false advertising, and misrepresentation causes of action for failure to state
 19 a claim. State Farm also requests the Court strike or dismiss the class definitions set
 20 forth in Plaintiff’s complaint and Plaintiff’s request for damages in connection with the
 21 UCL and FAL claims.

22 **II. MOTION TO DISMISS**

23 LEGAL STANDARD

24 A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the
 25 claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d
 26 729, 732 (9th Cir. 2001). When ruling on a motion to dismiss under Rule 12(b)(6), the

27
 28 ¹ State Farm was served with Plaintiff’s complaint on September 5, 2014, and thus
 removal was timely pursuant to 28 U.S.C. § 1446(b). (*See* Doc. No. 1, p. 3.)

1 court must accept all factual allegations pleaded in the complaint as true, and must
2 construe them and draw all reasonable inferences from them in favor of the nonmoving
3 party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). In doing so
4 however, the court is not bound to accept legal conclusions as true. *Ashcroft v. Iqbal*,
5 556 U.S. 662, 664 (2009).

6 A complaint must contain “a short and plain statement of the claim showing that
7 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). In the context of a Rule
8 12(b)(6) motion to dismiss, this means a complaint need not contain detailed factual
9 allegations; rather, the complaint must plead “enough facts to state a claim to relief that
10 is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim
11 has “facial plausibility when the plaintiff pleads factual content that allows the court to
12 draw the reasonable inference that the defendant is liable for the misconduct alleged.”
13 *Iqbal*, 556 U.S. at 678. “The plausibility standard is not akin to a ‘probability require-
14 ment,’ but it asks for more than a sheer possibility that a defendant has acted unlaw-
15 fully.” *Id.* “Where a complaint pleads facts that are merely consistent with a defendant’s
16 liability, it stops short of the line between possibility and plausibility of entitlement to
17 relief.” *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal citations omitted). As a result,
18 it is not proper for a court to assume a plaintiff can prove facts not alleged in the
19 complaint or that a defendant has violated the law in ways that have not been alleged.
20 *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S.
21 519, 526 (1983).

22 Further, complaints alleging fraud must satisfy the heightened pleading standard
23 of Rule 9(b). Rule 9(b) requires that in all averments of fraud or mistake, the circum-
24 stances constituting that fraud or mistake should be stated with particularity. Fed. R.
25 Civ. P. 9(b). Malice, intent, knowledge, and other conditions of a person’s mind may be
26 alleged generally. *Id.* Particularity under 9(b) requires the plaintiff to plead the “who,
27 what, when, where, and how” of the misconduct alleged. *Kearns v. Ford Motor Co.*, 567
28 F.3d 1120, 1124 (9th Cir. 2009.); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d

1 1097, 1106 (9th Cir. 2003) (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.
 2 1997)). Regardless of the title given to a particular claim, allegations grounded in fraud
 3 are subject to Rule 9(b)'s pleading requirements. *Vess*, 317 F.3d at 1103-04.

4 DISCUSSION

5 A. Request For Judicial Notice

6 Filed concurrently with the instant motion, State Farm filed a request for judicial
 7 notice pursuant to Federal Rule of Evidence 201. (Doc. No. 4-2.) State Farm requests
 8 the Court take judicial notice of the Policy issued to Philip along with Philip's applica-
 9 tion for insurance coverage. (*Id.* at 2.) "A district court ruling on a motion to dismiss
 10 may consider a document the authenticity of which is not contested, and upon which the
 11 plaintiff's complaint necessarily relies." *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th
 12 Cir. 1998), superseded by statute on other grounds as recognized in *Abrego Abrego v.*
 13 *The Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006); *Knieval v. ESPN*, 393 F.3d
 14 1068, 1076 (9th Cir. 2005). Further, when ruling on a Rule 12(b)(6) motion to dismiss,
 15 courts may consider material properly subject to judicial notice without converting the
 16 motion into one for summary judgment. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir.
 17 1994).

18 Plaintiff's claims arise out of the contract entered into between State Farm and
 19 Plaintiff as evidenced by the Policy. To prevail, Plaintiff is required to show, at least in
 20 part, that benefits were due under the terms of the Policy and such benefits were
 21 wrongfully withheld by State Farm. Further, Plaintiff does not dispute the authenticity
 22 of the Policy or the application for insurance completed by Philip, and frequently
 23 references the Policy in both the complaint and opposition to State Farm's motion. Thus,
 24 taking judicial notice of the Policy is appropriate in the instant case and State Farm's
 25 request for judicial notice is **GRANTED**.

26 B. Capacity To Sue

27 As an initial matter, State Farm argues Plaintiff's claims should be dismissed
 28 because Plaintiff failed to file a declaration as required by California Code of Civil

1 Procedure Section 377.32² and thus lacks capacity to sue. (Doc. No. 4-1, p. 24-25.)
 2 Such a defect, however, may be cured by promptly filing the required declaration. *See*
 3 *Stoddard Nunez v. City of Hayward*, No. 3:13CV4490, 2013 WL 6776189, at *8 (N.D.
 4 Cal. Dec. 23, 2013); *Estate of Burkhardt v. United States*, 7-5467, 2008 WL 4067429 at *
 5 10 (N.D. Cal. Aug. 26, 2008) (directing the plaintiff to file a declaration establishing
 6 capacity to sue after ruling on defendant's motion to dismiss). On November 17, 2014,
 7 Plaintiff filed a declaration setting forth the requirements for establishing capacity to sue
 8 under California Code of Civil Procedure 377.32. (Doc. No. 12.) Accordingly, State
 9 Farm's Motion to dismiss on this ground is **DENIED** as moot.

10 C. Unfair Competition Law (Bus. & Prof. Code § 17200)

11 State Farm moves to dismiss Plaintiff's first cause of action for violation of the
 12 UCL on the grounds Plaintiff does not adequately plead a fraudulent, unfair, or unlawful
 13 predicate act. (Doc. No. 4-1, p. 16.) The UCL is a broad remedial statute that permits
 14 individuals to challenge "unfair competition" practices, which are broadly defined as
 15 including "any unlawful, unfair, or fraudulent business act or practice and unfair,
 16 deceptive, untrue or misleading advertising" *Lozano v. AT & T Wireless Services,*
 17 *Inc.*, 504 F.3d 718, 731 (9th Cir. 2007); Cal. Bus. & Prof. Code § 17200. Plaintiff
 18 alleges fraudulent, unfair, and unlawful predicate acts as the basis for State Farm's
 19 liability under the UCL.

20 1. *Fraudulent Practices*

21 To state a claim under the fraudulent prong of the UCL a plaintiff must show that
 22 members of the public are likely to be deceived. *Berryman v. Merit Prop. Mgmt., Inc.*,
 23 152 Cal. App. 4th 1544, 1556 (2007). *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d
 24 1137, 1152 (9th Cir. 2008). Heightened pleading requirements under Rule 9(b) apply to
 25

26 ² Section 377.32 requires an individual who seeks to commence an action or
 27 proceeding or continue a pending action or proceeding as the decedent's successor in
 28 interest to file an affidavit or declaration setting forth certain facts including the
 decedent's name, date and place of decedent's death, and a statement that there is no
 other pending action in California for the administration of decedent's estate. *See* Cal.
 C. Civ. Proc. § 377.32.

UCL claims under the fraudulent prong. *Kearns*, 567 F.3d at 1124–25. Accordingly, claims sounding in fraud must allege “an account of the time, place, and specific content of the false representations as well as the identities of the parties to the representations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007).

State Farm argues that Plaintiff has failed to state a claim under the fraudulent prong because the complaint does not identify any statements that constitute fraudulent representations and otherwise only sets forth conclusory allegations. (Doc. No. 4-1, p. 19-20.) The Court agrees. Plaintiff’s complaint alleges that State Farm represented that the Policy pays the expenses incurred for each day, up to the maximum daily benefit for long-term care and that this representation was a significant factor in Philip’s decision to purchase the Policy. (Doc. No. 1-1, ¶ 42.) Additionally, Plaintiff alleges that the representations were made with the knowledge that the information was “false, with a reckless disregard to its truth, and/or with knowledge that it was deceptively incomplete.” (*Id.* ¶¶ 44, 47.) Plaintiff also alleges that State Farm’s conduct was likely to deceive Philip and members of the general public regarding the scope of insurance coverage. (*Id.* ¶ 45.) Looking at the complaint in its entirety, however, it is unclear who made the representations, when the representations were made, and what the specific representations were that constituted fraudulent activity. Such allegations are little more than a recitation of the necessary elements and will not defeat a motion to dismiss. *See Iqbal*, 556 at U.S. at 663. As such, Plaintiff’s complaint does not adequately plead a predicate violation of fraudulent activity under the UCL.

2. *Unfair Practices*

“Unfair” within the context of the UCL means “conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.” *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 187 (1999). California courts have also held that “unfair” conduct occurs when a practice “offends an established public policy or

1 when the practice is immoral, unethical, oppressive, unscrupulous or substantially
 2 injurious to consumers.” *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal.
 3 App. 4th 861, 887 (1999).

4 State Farm argues that Plaintiff has failed to state a claim under the “unfair” prong
 5 because the Court is prohibited from imposing its own notion of fairness upon the
 6 allegations in Plaintiff’s complaint. (Doc. No. 4-1, p. 21.) Plaintiff alleges that the
 7 individuals who purchase long-term care insurance coverage are elderly, physically and
 8 mentally incapacitated or disabled, and that State Farm preyed on these individuals for
 9 financial gain. (Doc. No. 1-1, ¶ 46.) Plaintiff further alleges that State Farm’s conduct
 10 offends established public policy and is immoral or unethical. (*Id.*)

11 The Court is not convinced Plaintiff has alleged sufficient facts to trigger a claim
 12 for relief under the unfair prong. Plaintiff’s primary allegation with regard to State
 13 Farm’s alleged violation of the UCL focuses on State Farm’s misrepresentations
 14 regarding the Policy, however no factual allegations are set forth to support a conclusion
 15 that the misrepresentations violated public policy or were immoral, unethical, or
 16 oppressive. For the same reasons the Court is unable to determine whether State Farm
 17 allegedly engaged in fraudulent conduct, the Court is unable to determine whether
 18 Plaintiff has sufficiently alleged unfair conduct. Accordingly, Plaintiff has failed to
 19 allege a predicate unfair act under the UCL.

20 3. *Unlawful Practices*

21 By proscribing “any unlawful” business practice, Section 17200 “borrows”
 22 violations of other laws and treats them as unlawful practices that the unfair competition
 23 law makes independently actionable. *Cel-Tech Communications, Inc.*, 20 Cal. 4th at
 24 180. A “violation of almost any federal, state, or local law may serve as the basis for
 25 a[n] [unfair competition] claim.” *Plascencia v. Lending 1st Mortg.*, 583 F. Supp. 2d
 26 1090, 1098 (N.D. Cal. 2008) (citing *Saunders v. Super. Ct.*, 27 Cal. App. 4th 832,
 27 838–39 (1994)); *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 676 (2009).

1 Plaintiff's complaint alleges State Farm's conduct was unlawful because its
 2 conduct violated 28 U.S.C. Section 7702B, California Insurance Code Section 10232.92,
 3 and California Welfare and Institutions Code Section 9701(b)(2). (*See* Doc. No. 1-1, ¶
 4 47.) State Farm's motion to dismiss argues that these statutes and code sections do not
 5 regulate State Farm's conduct or the benefit amounts due to insureds and thus cannot be
 6 used to establish "unlawful conduct" under the UCL. (Doc. No. 4-1, p. 8.)

7 Each of the three alleged statutory violations fail for lack of specificity as to how
 8 these statutes or code sections are applicable and were allegedly violated by State Farm's
 9 denial of policy benefits. For example, Section 7702B defines qualified long-term care
 10 insurance in the context of the Internal Revenue Code, but in her opposition Plaintiff
 11 admits the tax treatment of Qualified Long-Term Insurance is not at issue nor does
 12 Plaintiff allege that the coverage represented in the Policy does not comply with Section
 13 7702B. (Doc. No. 11, p. 10.) Likewise, Insurance Code Section 10232.32 appears to
 14 provide certain coverage requirements for long-term care insurance, but it is unclear
 15 which provision was violated and how the California Insurance Code section applies to
 16 the Policy which was issued in Texas. Welfare and Institutions Code Section 9701(b)(2)
 17 defines long-term care insurance in the context of the Mello-Granlund Older Califor-
 18 nians Act, and Plaintiff references this code section to provide a definition for long-term
 19 care insurance, but otherwise provides little basis from which the Court can conclude a
 20 violation occurred. Although the "unlawful" prong of the UCL "borrows" violations of
 21 other laws and makes them independently actionable, Plaintiff's complaint must set forth
 22 facts from which the Court can conclude a violation occurred. Where a plaintiff cannot
 23 state a claim under the "borrowed" law, she cannot state a UCL claim either. *See, e.g.,*
 24 *Smith v. State Farm Mutual Automobile Ins. Co.*, 93 Cal. App. 4th 700, 718 (2001);
 25 *Phipps v. Wells Fargo Bank, N.A.*, No. 10 2025, 2011 WL 302803, at *17 (E.D. Cal. Jan.
 26 27, 2011). Accordingly, Plaintiff's complaint fails to state a predicate unlawful act under
 27 any of the identified statutes.
 28

1 Based on the foregoing, Plaintiff's UCL claim is **DISMISSED** with leave to
 2 amend to more adequately allege violations under any or all of the UCL prongs.

3 D. False Advertising Law (Bus. & Prof. Code § 17500)

4 Plaintiff's second cause of action is for violation of the FAL, which prohibits false
 5 or misleading statements "made or disseminated before the public in this state" and
 6 "from this state before the public in any state." Cal. Bus. & Prof. Code § 17500. This
 7 statute "makes it unlawful for a business to disseminate any statement 'which is untrue
 8 or misleading, and which is known, or which by the exercise of reasonable care should
 9 be known, to be untrue or misleading . . .'" *Ariz. Cartridge Remanufacturers Ass'n, Inc.*
 10 *v. Lexmark Intern., Inc.*, 421 F.3d 981, 985 (9th Cir. 2005) (quoting the FAL). "The law
 11 encompasses not just false statements but those statements 'which may be accurate on
 12 some level, but will nonetheless tend to mislead or deceive'. . . ." *Id.* A perfectly true
 13 statement couched in such a manner that it is likely to mislead or deceive the consumer,
 14 such as by failure to disclose other relevant information, is actionable under the FAL.
 15 *Day v. AT & T Corp.*, 63 Cal. App. 4th 325, 333 (1998)); *Arevalo v. Bank of Am. Corp.*,
 16 850 F. Supp. 2d 1008, 1024 (N.D. Cal. 2011).

17 State Farm moves to dismiss this claim on the grounds that the Policy was issued
 18 in Texas and therefore Plaintiff cannot allege that Philip relied on any false advertising
 19 in California or from California before purchasing the Policy. (Doc. No. 4-1, p. 24.) In
 20 opposition, Plaintiff claims there are sufficient facts pleaded to support the FAL claim as
 21 Philip and Plaintiff maintained the Policy after moving to California in reliance on State
 22 Farm's representations. (Doc. No. 11, p. 19-20.) Plaintiff also alleges that "it is
 23 reasonable to infer that Defendant marketed the same product in California, made the
 24 same representations in California and such false representations were observed and
 25 relied upon for the purchase of insurance policies by California citizens." (*Id.*)

26 A review of Plaintiff's complaint presents a more significant issue than just the
 27 location in which the Policy was issued. As noted in the analysis of whether Plaintiff
 28 properly pled fraudulent activity as a predicate violation of the UCL, Plaintiff's FAL

1 allegations are generic in nature and provide no basis from which the Court can conclude
 2 what representations State Farm allegedly made regarding long-term care insurance.
 3 Plaintiff's complaint repeatedly references State Farm's website and sales presentation
 4 but provides no details regarding what representations were allegedly made. (*See* Doc.
 5 No. 1-1, ¶ 53.) Without the ability to analyze the representations allegedly made by State
 6 Farm in violation of the FAL, the Court is without a means to analyze where those
 7 alleged misrepresentations occurred and whether "it is reasonable to infer" that such
 8 representations were made in California.

9 Accordingly, Plaintiff's second cause of action for violation of the FAL is
 10 **DISMISSED** with leave to amend. Should Plaintiff amend her complaint to properly
 11 allege a violation of the FAL, Plaintiff should also specify how the FAL applies to a
 12 policy issued in Texas.³

13 E. Misrepresentations claims

14 *Economic Loss Rule*

15 State Farm moves to dismiss Plaintiff's misrepresentation claims as barred by the
 16 economic loss. (Doc. No. 4-1 at 23.) Specifically, State Farm argues that Plaintiff fails
 17 to allege any damages "independent" of the breach of contract claim and thus Plaintiff
 18 should not be allowed to recover in tort for the alleged insurance benefits due under the
 19 Policy. (*Id.*) In opposition, Plaintiff claims that she has properly pled "economic loss"
 20 in the form of policy premiums to support her misrepresentation claims. (Doc. No. 11 at
 21 19.)

24 ³ State Farm also moves to dismiss or strike Plaintiff's request for damages in
 25 conjunction with the UCL and FAL claims. (Doc. No. 4-1, p. 25-26.) District Courts do
 26 not have discretion to strike an improper request for damages. *See Whittlestone, Inc. v.*
 27 *Handi Craft Co.*, 618 F.3d 970, 972 (9th Cir. 2010). However, to the extent Plaintiff has
 28 failed to adequately state a claim as to both the UCL and FAL claims, any request for
 damages—either restitutionary or injunctive in nature—similarly fails and is therefore
 dismissed from the complaint by way of dismissing the first and second causes of action.

Under California law, the economic loss doctrine bars tort claims based on the same facts and damages as breach of contract claims. The doctrine “precludes recovery for ‘purely economic loss due to disappointed expectations,’ unless the plaintiff ‘can demonstrate harm above and beyond a broken contractual promise.’ ” *Multifamily Captive Grp., LLC v. Assurance Risk Managers, Inc.*, 629 F. Supp. 2d 1135, 1146 (E.D. Cal. 2009) (quoting *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004)); *see also Cnty. of Santa Clara v. Atlantic Richfield Co.*, 137 Cal. App. 4th 292, 328 (2006) (stating that the economic loss rule applies unless “the plaintiff can establish that the fraud exposed the plaintiff to liability”). The rule seeks to “prevent the law of contract and the law of tort from dissolving one into the other.” *Robinson Helicopter*, 34 Cal. 4th at 988 (internal quotation marks omitted). “To allow a fraud claim [where the false representations underlying it are those made in the contract itself] would ‘open the door to tort claims in virtually every case in which a party promised to make payments under a contract but failed to do so.’ ” *Multifamily Captive Group*, 629 F. Supp. 2d at 1146 (quoting *Intelligraphics, Inc. v. Marvell Semiconductor, Inc.*, No. C07–02499, 2009 WL 330259, at *17 (N.D. Cal. Feb. 10, 2009)).

Upon review of Plaintiff’s complaint, the Court finds both the negligent and intentional misrepresentation claims are merely restatements of the contract claims. Plaintiff does not allege any specific injury distinct from the breach of contract claim. In connection with the fifth cause of action for intentional misrepresentation, Plaintiff alleges that State Farm “wrongfully and intentionally misrepresented California law relating to the coverage at issue and the licensure of residential care facilities for the elderly under California law.” (*See* Doc. No. 1-1 at ¶ 69.) Plaintiff makes similar allegations with respect to the sixth cause of action for negligent misrepresentation, namely that Plaintiff has harmed as a result of State Farm’s misrepresentations about the terms of the Policy and accordingly, Plaintiff was required to pay money allegedly owed under the terms of the Policy which State Farm. (Doc. No. 1-1, ¶ 77.) There is no separate allegation of tortious conduct independent of Plaintiff’s breach of contract

claim. Further, the only damages Plaintiff alleges in the complaint are the benefits due under the Policy. Accordingly, the Court finds that as currently pleaded, Plaintiff's fifth cause of action for negligent misrepresentation and sixth cause of action for intentional misrepresentation are barred by the economic loss doctrine. Plaintiff's fifth and sixth causes of action are therefore **DISMISSED** with leave to amend.⁴

III. MOTION TO STRIKE

LEGAL STANDARD

Under Rule 12(f), "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Rule 12(f) is a vehicle by which to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Sidney-Vinstein v. A.H. Robins Co., Inc.*, 697 F.2d 880, 885 (9th Cir. 1983). Whether to strike a matter pursuant to Rule 12(f) is within a court's discretion. *See Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir. 2000); *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other grounds, 510 U.S. 517 (1994).

DISCUSSION

Class Definitions

State Farm requests the Court strike or dismiss the class definitions set forth in Plaintiff's complaint. (Doc. No. 4-1, p. 27.) State Farm claims Plaintiff alleges two different class definitions, one in paragraph six of the complaint, and the other in paragraph twenty-nine. (*Id.*) Paragraph six of Plaintiff's complaint defines the class as "all individuals who have purchased a long-term care insurance policy from State Farm Mutual Automobile Insurance Company intended to be a Qualified Long-Term Care Insurance Contract as defined by the Internal Revenue Code of 1986." (Doc. No. 1-1, ¶ 6.) Paragraph twenty-nine of Plaintiff's complaint defines the class as "all California

⁴ As the Court finds Plaintiffs intentional and negligent misrepresentation claims barred by the economic loss doctrine the Court does not address State Farm's alternate grounds for dismissal of those claims for failure to comply with the heightened pleading requirements of Rule 9(b).

1 residents who purchased a State Farm Mutual Automobile Insurance Company policy
 2 intended to be a qualified long-term insurance contract as defined by the Internal
 3 Revenue Code of 1986, but were denied full policy benefits due to State Farm's unrea-
 4 sonable and unlawful characterization of residential care facilities as alternative care
 5 facilities rather than long-term care facilities as provided by California law." (*Id.* ¶ 29.)
 6 In addition to arguing the above class definitions should be dismissed or struck as
 7 inconsistent and unclear, State Farm argues the definition in paragraph six is over broad,
 8 and the definition in paragraph twenty-nine is an improper "fail safe" class. (Doc. No. 4-
 9 1, p. 28.) In her opposition, Plaintiff clarifies that the intended class definition is the one
 10 set forth in paragraph twenty-nine, but Plaintiff does not address the argument that
 11 paragraph twenty-nine defines an impermissible "fail safe" class. (Doc. No. 11, p. 20.)

12 Class allegations can be stricken at the pleading stage. *See Kay v. Wells Fargo &*
 13 *Co. N.A.*, Case No. 07-1351, 2007 WL 2141292, at *2 (N.D. Cal. July 24, 2007).
 14 However, generally courts review class allegations and definitions through a motion for
 15 class certification. *Velasquez v. HSBC Fin. Corp.*, No. 08 4592, 2009 WL 112919, at *4
 16 (N.D. Cal. Jan. 16, 2009); *Thorpe v. Abbott Labs., Inc.*, 534 F. Supp. 2d 1120, 1125
 17 (N.D. Cal. 2008) ("Motions to strike class allegations are disfavored because a motion
 18 for class certification is a more appropriate vehicle for the arguments."); *see also In re:*
 19 *Wal-Mart, Inc. Wage & Hour Litig.*, 505 F. Supp. 2d 609, 614-16 (N.D. Cal. 2007)
 20 (collecting cases).

21 The Court agrees that a motion for class certification is a more appropriate time to
 22 consider the class allegations in Plaintiff's complaint. At this time, State Farm has not
 23 answered, no discovery has been conducted, and a motion for class certification is not
 24 presently before the Court. However, State Farm's arguments regarding the propriety of
 25 the class definitions are well taken. As currently defined, it is difficult to ascertain not
 26 only who would comprise the proposed class, but also how a class action could ade-
 27 quately account for individual claims of proposed plaintiffs who obtained services from
 28 different long-term care facilities. Yet, while Plaintiff's class definition may require

1 further clarification, Plaintiff should be given the opportunity to make the case for
2 certification in a later motion where such issues can be evaluated by the Court in their
3 entirety. Accordingly, State Farm's motion to strike the class allegations is **DENIED**
4 without prejudice.

5 **IV. CONCLUSION**

6 Based on the foregoing, the Court **GRANTS IN PART** and **DENIES IN PART**
7 State Farm's motion to dismiss and/or strike portions of Plaintiff's complaint as follows:

- 8 1. State Farm's request for judicial notice filed concurrently with the instant
9 motion is **GRANTED**.
- 10 2. State Farm's motion to dismiss Plaintiff's complaint for lack of capacity to
11 sue is **DENIED** as moot.
- 12 3. State Farm's motion to dismiss Plaintiff's first cause of action for violation
13 of California's Unfair Competition Law is **GRANTED** with leave to amend.
- 14 4. State Farm's motion to dismiss Plaintiff's second cause of action for
15 violation of California's False Advertising Law is **GRANTED** with leave to
16 amend.
- 17 5. State Farm's motion to dismiss Plaintiff's fifth and sixth causes of action as
18 barred by the economic loss rule is **GRANTED** with leave to amend.
- 19 6. State Farm's motion to strike the class allegations in Plaintiff's complaint is
20 **DENIED** without prejudice.

21 *IT IS SO ORDERED:*

22
23 *DATED: December 22, 2014*

24 
25 *Hon. Anthony J. Battaglia*
26 *U.S. District Judge*
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